No. 88-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDDIE KELLER, *et alia*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et alia*,

Respondents.

On petition for a writ of certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS *and* BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners. Respondent State Bar of California has refused consent for the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a non-profit, charitable organization formed to provide free legal assistance to individual employees who,

as a consequence of their subjection to compulsory unionism, suffer violations of their right to work; freedoms of association, speech, petition, and religion; right to procedural due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States.

To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from paying, in whole or in part, compulsory dues and fees to labor organizations for those organizations' use in legislative and judicial lobbying or other forms of ideological activism. These cases include *Abood* v. *Detroit Board of Education*[1], *Ellis* v. *Railway Clerks*[2], and *Chicago Teachers Union* v. *Hudson*[3].

The Foundation is concerned with the instant case because, unless overruled here, the decision of the Supreme Court of California could seriously undermine the constitutional rights of nonunion employees heretofore established in *Abood*, *Ellis*, and *Hudson* with respect to the expenditure of compulsory dues and fees by unions for ideological causes.

PURPOSE OF THE BRIEF *AMICUS CURIAE*

Because petitioners will naturally focus on their particular circumstances as they relate to the context of an integrated bar in a single State, they may not sufficiently emphasize the general nationwide importance of the decision of the Supreme Court of California as it relates, or could be applied, to other arrangements or situations involving compulsory dues and fees, particularly in the

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[1]431 U.S. 209 (1977).

[2]466 U.S. 435 (1984).

[3]475 U.S. 292 (1986).

labor-relations context with which the Foundation is uniquely concerned.

Through its annexed brief *amicus curiae*, the Foundation hopes to provide this Court with a broader perspective on the significance of the ruling and reasoning of the Supreme Court of California, and the pressing need for reversal here.

WHEREFORE, the Foundation prays that this Court grant its motion, and permit the filing of the annexed brief *amicus curiae*.

Respectfully submitted,

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INTRODUCTION

Pursuant to a motion for leave to file under Rule 36.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation submits this brief *amicus curiae* in support of petitioners.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF THE ARGUMENT

I. The Supreme Court of California erroneously substitutes mere labels for reasoned analysis—assuming that, by characterizing the State Bar of California as a "governmental" entity for purposes of California law, it can avoid the strictures of United States constitutional law that this Court applied to labor unions in the *Abood* line of cases. However, from the special perspective of the First Amendment, no significant operational distinction exists between:

(i) the State Bar of California—a membership-organization of private individuals which California law invests with state authority sufficient to give it some "governmental" character; and

(ii) a labor union acting as an "exclusive representative" of nonunion employees—also a membership-organization of private individuals which state or federal law invests with authority sufficient to characterize its acts in that role as "governmental action".

Thus, the proscriptions against the use of compulsory dues and fees by labor unions for lobbying and other legislative and judicial activities must apply *tout court* to the State Bar of California.

II. Any other result would license Congress and the State legislatures to nullify *Abood*[1], *Ellis*[2], and related cases by the merely verbal expedient of defining as a species of "governmental" entity a labor union acting as an "exclusive representative" of nonunion employees under color of statute. And this license—applied to other discrete professional, economic, and social groups—could eventuate in the radical politicization of this country into the "goose-stepping brigades" of political conformists "at least partially regimented behind causes which they oppose" against the creation of which Mr. Justice Douglas foresightedly premonished this Court in *Lathrop* v. *Donohue*[3].

ARGUMENT

Perhaps the most eloquent summary of the fundamental principle animating the line of this Court's decisions in which *Abood* occupies the temporal center is the statement of Mr. Justice Black in *Street* that

> [p]robably no one would suggest that [a legislature] could, without violating [the First] Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain * * * groups favored by the Government to * * * promote their controversial causes. Compelling a man by law to pay his money to * * * advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for * * * a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.

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[1]Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[2]Ellis v. Railway Clerks, 466 U.S. 435 (1984).

[3]367 U.S. 820, 884 (1961)(dissenting opinion)(footnote omitted).

> There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it. * * * But a different situation arises when a * * * law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by [the legislature], cannot be used in a way that abridges the specifically defined freedoms of the First Amendment. And whether there is such abridgment depends not only on how the law is written but also on how it works.
>
> There can be no doubt that the [law under scrutiny] here, as it actually works, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects [governmental] compulsion into the political and ideological processes, a result which * * * everyone would agree the First Amendment was particularly intended to prevent.[4]

Attempting to avoid application of this principle to the State Bar of California, the Supreme Court of California "conclude[s] that the State Bar, considered as a government agency, may use [compulsory] dues for any purpose within the scope of its statutory authority", including lobbying and litigation that some members of the Bar oppose; and that the Bar's "use of dues" is not "subject to restrictions hitherto imposed only on labor unions and other private associations", because "no precedent supports the imposition of such restrictions on a governmental

[4]Machinists v. Street, 367 U.S. 740, 788-89 (1961)(dissenting opinion)(footnotes omitted), *cited in* Buckley v. Valeo, 424 U.S. 1, 91 n.124 (1976).

agency".[5] This decision is both fatuous in terms of constitutional analysis and fatal, not only to First-Amendment freedoms generally, but even to the continued existence of republican government in both California and the United States.

I. The Supreme Court of California's characterization of the State Bar of California as a "governmental agency" frames, but does not answer, the fundamental First-Amendment issue here for decision.

A. The majority opinion of the Supreme Court of California is a sorry example of *petitio principi*. To be sure, if the State Bar of California can properly be "considered as a government agency" in a sense that precludes application to it of the federal constitutional principles of *Abood* and related cases, then the "restrictions hitherto imposed only on labor unions and other private associations" do not apply, by hypothesis. The question the Supreme Court of California leaves unanswered, however, is: "*Why* should the Bar be 'considered as a government agency' in that special—indeed, unique—sense?"[6]

The explanation for the California court's confusion appears in its inaccurate reference to the "restrictions hitherto imposed only on labor unions and other private associations". As this statement evidences, the court fails to recognize that, if "the State Bar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority", so too may a labor

[5]Keller v. State Bar of California, 767 P.2d 1020, 1030 (Cal. 1989).

[6]The Foundation here assumes *arguendo* that, indeed, true "governmental agencies" enjoy some narrow immunity from First-Amendment scrutiny of their expenditures. *But cf.* Flast v. Cohen, 392 U.S. 83 (1968).

union, considered solely as a private organization, use its dues for any purpose within the scope of its otherwise lawful by-laws. Yet, *Abood* and related cases hold that a seemingly "private" labor union may not constitutionally use dues and fees compulsorily extracted from nonmembers for purposes unrelated to the collective bargaining it performs as those employees' statutory "exclusive representative". Of course, the antinomy is only apparent: For a labor union acting as the statutory "exclusive representative" of nonmembers cannot be considered solely as a "private" organization for purposes of the First Amendment, in as much as its status and power as "exclusive representative"—from which derive its claim and ability to collect compulsory dues and fees—are the products of "governmental action".[7]

But such analysis applies equally to the State Bar of California! As is a labor union operating under the statutory principle of "exclusive representation", *au fond* the Bar is an organization composed of private individuals compelled by law to become "members" as a condition of their employment (the practice of law), to acquiesce in its "representation" of and control over that employment, and to finance Bar activities through compulsory dues and fees. As does such a labor organization, the Bar exercises extraordinary statutory authority, purportedly in pursuit of various "public interests", under the regulatory supervision of the government. Thus, as is a labor organization serving as an "exclusive representative", the Bar is inher-

[7]In addition to *Abood*, 431 U.S. at 226 (Michigan Public Employment Relations Act), *see* Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99, 203 (opinion of the Court), 208 (Murphy, J., separate opinion)(1944)(Railway Labor Act), and American Communications Ass'n v. Douds, 339 U.S. 382, 401-02 (1950); Vaca v. Sipes, 386 U.S. 171, 181-83 (1967); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180-81 (1967)(National Labor Relations Act).

ently and ineradicably private by virtue of its natural composition, and only incidentally and changeably "governmental" by virtue of its acquired statutory authority. Therefore, as may a union, the Bar may be described as "governmental" in character because the power it exercises over its members is the product of "governmental action". However, this "governmental" character derives entirely from the Bar's special statutory status *super*added to the pre-existent and ever-continuing private nature of its individual members, which the metaphorically "governmental" character of the Bar never fundamentally changes.[8]

The implicit teaching of *Abood* is that the inherently and unchangeably private nature of the Bar—its composition of private lawyers—is controlling for purposes of

[8]Revealingly, the Supreme Court of California never suggests either that the supposed "governmental" character of the Bar derives from some pre-existent "governmental" character of its individual members, or that the supposed "governmental" character of the Bar reflexively infuses those members, as individuals, with some identity as "governmental" agents or actors. Of course, in a true "governmental agency", contrastingly, both the agency and the agents partake of the "governmental" character in a mutually reciprocal fashion.

The major source of intellectual difficulty here is that the Bar is neither "private" nor "governmental", but economically and politically hermaphrodictic. It exemplifies a so-called "corporative-state" structure, in which a group of private individuals collectively exercise delegated governmental authority purportedly in a manner simultaneously conducive to both the public interest and the group members' special private interests. The theory of corporative-state organization of society was widely discussed in the 1920s and 1930s, but is little studied today. *See* 6 *Encyclopaedia Britannica*, "Corporate State" (1963 ed.), at 524. The leading exponents of corporative-state institutions at that time were primarily Italian (although those institutions have had, and still have, forceful advocates among British, French, German, and American schools of political science). *See, e.g.*, F. Pitigliani, *The Italian Corporative State* (1933). Perhaps for this reason the California court need not be especially faulted for not fully coming to grips with the problem facing it.

constitutional analysis.[9] The Supreme Court of California may be correct to describe the Bar in some Orwellian sense as a "a governmental agency" under the California constitution and the State's statutes and court decisions. But, under the Constitution of the United States—and particularly with respect to the freedoms of speech, association, and petition protected by the First Amendment—what California quixotically labels "a governmental agency", if composed of private individuals including compulsory members, is and can be no more than a private organization infused with "governmental action".[10] That "governmental action" is the predicate for constitutional scrutiny of and limitations on the latitude of the organization's infringements of its members' First-Amendment liberties. It does not immunize those infringements from correction, as the California court wrongly presumes.

B. The ways in which "[t]he California Constitution, statutes, and judicial decisions * * * appear to envision the [B]ar as a governmental agency" detract from this con-

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[9]Although *Abood* involved actual government employees, no one even suggested in that case that the labor union certified as those employees' "exclusive representative" was a "governmental agency" in the sweeping sense the Supreme Court of California applies to the California Bar.

See also the cases cited by the dissent below for the proposition that "membership" of private individuals compelled by law "subjects an association—whether private or governmental [in name]—to First Amendment constraints". Keller, 767 P.2d at 1042-43 (Kaufman, J., concurring and dissenting).

[10]Surely, the State's mere choice of label has no preclusive effect on the First-Amendment issue. *See* City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976). *Accord*, NAACP v. Button, 371 U.S. 415, 429 (1963), followed in New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Riley v. National Fed'n of the Blind, ___ U.S. ___, 108 S. Ct. 2667, 2677 (1988).

clusion not at all.[11] For in none of these ways is the Bar sufficiently distinguishable from a labor union designated the "exclusive representative" of dissenting employees to vitiate the primary identity between the two: a membership of private individuals compelled by "governmental action" to finance the organization's activities.

1. That the Bar is a "public corporation" under the California constitution proves nothing. For a "public corporation" in the peculiar case of the Bar is simply an organization subject to legislative and judicial regulation under the "police power" that is vested with some governmental authority and performs some governmental function with respect to a segment of the population "which, by reason of career, shares common interests".[12] This is also an apt description of a labor union invested with the authority of an "exclusive representative"[13]— especially in the public sector, where collective bargaining between the union and a governmental employer clearly appears as a governmental function.[14]

2. That the Bar's 22-member "Board of Governors includes six public members appointed by the Governor, who are not members of the [B]ar"[15] proves no more.[16] A controlling majority of the board is still elected by the

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[11]Keller, 767 P.2d at 1025-27.

[12]*Id.* at 1026, 1029 n.15.

[13]*See, e.g.*, Steele, 323 U.S. at 198-99, 203.

[14]*See, e.g.*, Abood, 431 U.S. at 228-29.

[15]Keller, 767 P.2d at 1026.

[16]*Cf.* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866-67 (1824)(directors of bank appointed by President and confirmed by Senate are not "Officers of the United States").

private lawyers who comprise the Bar, as in a labor union or any other private organization.

3. Neither does the Bar's tax-exempt status have any peculiar constitutional significance.[17]

4. Nor does California's regulation of the Bar's meetings, its procedures, or the privileges of its officers imply any difference of constitutional dimension between it and a labor union.[18]

5. Nor does application of the California tort claims act to the Bar imply anything important, in as much as the act explicitly covers every public corporation in the State.[19] And,

6. Far from establishing a constitutional distinction, the statutory prohibition against the Bar's "conduct[ing] or participat[ing] in any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice"[20] could reflect no more than the California legislature's intent to preclude the Bar from misusing compulsory dues for a form of political proselytism, not unlike election-campaign restrictions on unions at the federal level.[21]

In short, nothing the California Supreme Court advances to distinguish the Bar as a supposedly "govern-

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[17]*See* Internal Revenue Code § 501(c)(5).

[18]*See* Labor Management Reporting & Disclosure Act, 29 U.S.C. §§ 401-531.

[19]Keller, 767 P.2d at 1027 & n.10.

[20]*Id.* at 1027.

[21]*See* 2 U.S.C. § 441b.

mental agency" from a supposedly "private" labor union acting as an "exclusive representative" under color of state or federal law detracts from the identity of the two for all constitutional purposes relevant here.[22]

C. Of course, that the principles of *Abood* and related cases apply to the Bar still leaves the questions of whether (i) expenditures of its members' compulsory dues and fees on tendentious briefs *amici curiae* and lobbying subserve a "compelling state interest" and, if they do, (ii) whether such expenditures are the means "least restrictive" of dissenting lawyers' First-Amendment freedoms. To these questions, though, the answers are obvious.

1. Because the Bar "regularly acts on behalf of the special interest of its members", as well as "to promote the public interest,"[23] two classes of judicial and legislative activism by the Bar need to be distinguished one from the other. *First*, no "compelling state interest"—indeed, no legitimate "*state* interest" at all—exists in forcing dissenting members of the Bar to subsidize judicial and legislative activism aimed at promoting the special professional or economic interests of the Bar as a whole, let alone discrete segments of the Bar that do not include the dissenters. No legislature has the authority to politicize a profession, occupation, trade, or economic class by requiring individuals to accept spokesmen for the group (no matter how selected) to determine what shall constitute "ortho-

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[22]Respondent California State Bar adds to this litany the observations that the Bar "is required to obtain explicit legislative approval before assessing any fees", and that "the legislature passes a bill authorizing assessments at the level it deems appropriate". Respondent's Brief in Opposition in No. 88-1905, at 5. This, however, is no different in principle from the governmental oversight of labor-union compulsory dues and fees common in the public and private sectors. *See, e.g.*, Minn. Stat. § 179A.06, subd. 3; National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3).

[23]Keller, 767 P.2d at 1025.

doxy" with respect to legislation and judicial decisions that may affect the welfare of the group's members.

The rationalization for "exclusive representation" with respect to negotiation of terms and conditions of employment in the labor-relations context is that

> [t]he designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment * * * prevents inter-union rivalries from creating dissension within the work force and * * * frees the employer from the possibility of facing conflicting demands from different unions * * *.[24]

Self-evidently, this rationalization has no bearing whatsoever where no actual negotiations between employers and employees are involved. Rather, what might appear as undesirable "confusion", "rivalries", "dissension", and "conflicting demands" in a labor-relations context constitute the very plurality and diversity of views, robust debate, and political and ideological competition that the First Amendment guarantees in the legislative arena. So, in the latter context no room exists for governmentally imposed monopolies of political "truth" or "wisdom", whether the monopolists attempt to silence dissenters altogether,[25] or (as here) to compel dissidents to subsidize the legislative or judicial lobbying the dissidents oppose. Indeed, "[t]o permit one side of a debatable public question to have a

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[24]Abood, 431 U.S. at 220-21.

[25]*E.g.*, City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167 (1976), especially at 175-76 & n.10.

monopoly in expressing its views to the government is the antithesis of constitutional guarantees".[26]

Second, no "compelling state interest" exists in forcing dissident members of the Bar to subsidize judicial and legislative activism aimed at promoting an ostensibly "public" interest, either. True, as the California court noted,

> [t]he drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal.[27]

But equally true is the likelihood—yea, the moral certainty—that "among the members of the State Bar are some" who will disagree—on technical, professional, political, moral, or purely personal grounds—with those others "whose collective advice" the Bar chooses to proffer to the legislature at the dissenters' expense. In as much as the legislature cannot appreciably benefit from being presented with an apparent, but actually artificial and deceptive compelled "consensus" among the State's lawyers, the compulsory subsidization of lobbying by the Bar even in this case ultimately serves no purpose beyond that of

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[26]*Id.* at 175-76 (footnote omitted). Even though the Bar does not attempt to silence dissenting members outright, it does obtain a practical "monopoly in expressing its views to the government" *pro tanto*, to the extent that it can expend dues and fees extracted from dissenters and thereby diminish their abilities to promote the legislation, litigation, and other causes they may favor. *See* Branti v. Finkel, 445 U.S. 507, 513-14 (1980); Elrod v. Burns, 427 U.S. 347, 355-56 (1976).

[27]Keller, 767 P.2d at 1030.

advancing the perceptions of one segment of the Bar as to what constitutes the "public good" in particular areas of legislation.[28]

2. Moreover, compulsory subsidization of judicial and legislative lobbying is not the alternative "least restrictive" of the First-Amendment freedoms of dissident California lawyers. If the Bar actually subserves true public interests by informing the courts and the legislature of its members' collective position on various matters in their capacities as "legal experts" (rather than special pleaders for their own private interests), the legislature may fund those activities from general taxes to whatever level it deems desirable.[29]

II. If government may insulate from constitutional scrutiny the lobbying and other legislative and judicial activism of a private group composed in part of involuntary members by labelling that group a "governmental agency", no limits exist to the complete political and ideological regimentation of American society.

Shou'd this Court accept the thesis of the majority of the Supreme Court of California that, merely by labelling a private group a "governmental agency" the government may insulate the lobbying and other legislative and judicial activism of that group from constitutional scrutiny, potentially disastrous consequences could, and likely will, follow

[28]Certainly no justification exists in the notion that the Bar should be licensed to force its refractory members to lend their (unwilling) support to "good" causes. For "no one has a right to press even 'good' ideas on an unwilling recipient". Rowan v. Post Office Dep't, 397 U.S. 728, 738 (1970).

[29]Under the circumstances postulated in the text, most of the knotty First-Amendment problems implicated in this case would disappear. For "[c]ompelled support of a private association is fundamentally different from compelled support of government". Abood, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).

for political and ideological pluralism in this country, both in the narrow area of labor relations and generally throughout society.

A. The perverse reasoning of the California court directly undermines the *Abood* doctrine. If an otherwise private labor union functioning as an "exclusive representative" under color of state or federal law can be (to use the weasel-words of the California court) "*considered as* a government agency" [emphasis supplied], then the restrictions this Court has fashioned against such a union's expenditure of compulsory dues and fees on lobbying and other legislative and judicial activism evaporate.

The California court's decision implicitly instructs those anxious to advance the political power of compulsory unionism how this can be done—namely, by investing unions with the salient characteristic that the court says primarily distinguishes the Bar "as a government agency" from a labor union as a "private" organization: *i.e.*, designation of the union as a "public corporation" or equivalent entity. This is hardly fanciful or unlikely. For all unions functioning as statutory "exclusive representatives" have been "formed (at least in part) for * * * governmental purposes and vested with * * * governmental powers" over "a portion of the state"[30] in the sense that the statutes under color of which the unions operate

> clothe the bargaining representative[s] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those [employees] whom [the unions] represen[t] * * *.[31]

[30]Keller, 767 P.2d at 1026.

[31]Steele, 323 U.S. at 202.

Moreover, if "legislative and judicial regulation" under the "police power" is "sufficient to classify the [B]ar as a public corporation",[32] such a classification surely applies in principle to labor unions certified under color of law as "exclusive representatives". For compulsory unionism is nothing if not the product of extensive and pervasive "legislative and judicial regulation" of the relationship of employment under the "police power" at the state level[33] or the constitutionally equivalent "commerce power" at the national level.[34]

Thus, a legislative or judicial declaration that labor unions functioning as "exclusive representatives" are somehow "public" entities (in the broad sense defined above) would be an accurate label.[35] And if the mere application of labels can defeat the enforcement of constitutional guarantees, as the decision of the California court teaches here, then recognition that labor unions functioning as "exclusive representatives" under color of law are "public" entities carries with it an extension to them of blanket immunities from First-Amendment limitations on their expenditures of compulsory dues and fees for legislative and judicial lobbying.

This, of course, will rapidly result in the regimentation, in every area of employment subject to compulsory collec-

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[32]Keller, 767 P.2d at 1026.

[33]*See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949).

[34]U.S. Const. art. I, § 8, cl. 3. *See, e.g.*, United States v. Darby, 312 U.S. 100, 114-15 (1941)("exercise [of commerce power] is attended by the same incidents which attend the exercise of the police power of the states").

[35]Assuming *arguendo* that compulsory collective bargaining through "exclusive representation" is properly a "governmental function" in either the public or the private sector.

tive bargaining, of the "goose-stepping brigades" of political and ideological conformists that Mr. Justice Douglas foresaw in *Lathrop*.[36] For vanishingly few unions will shrink from offering Congress and the state legislatures their "expert assistance" with respect to proposed or pending legislation concerning what the unions perceive as their members' economic, social, and political interests.[37]

B. More than this, however, will likely follow. Unions are not the only private associations or groups that are, can be, or have been organized around the statutory principle of "exclusive representation". At the outset of the Great Depression, the National Industrial Recovery Act (NIRA) authorized private "trade or industrial associations or groups" to lobby for presidential approval of "codes of fair competition for the trade or industry represented by the applicants" (the so-called "code authorities"), and made these "codes" the "standards of fair competition for [each] such trade or industry" upon the President's approval.[38] The sole substantive requirement on the private "associations or groups" licensed to act as "exclusive representatives" of their respective trades or industries was that they "impose no inequitable restrictions on * * * membership * * * and are truly representative of such trades or industries".[39]

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[36]367 U.S. at 884-85 (dissenting opinion)(footnote omitted).

[37]Arguably, if lobbying by the Bar is proper to provide the legislature with the Bar's "expert legal assistance", then lobbying by any union should be equally proper to provide the legislature with the latter's "expert assistance" in the area in which its members are qualified.

[38]Act of 16 June 1933, ch. 90, § 3(a, b), 48 Stat. 195, 196.

[39]NIRA § 3(a), 48 Stat. at 196. *Compare* the so-called "duty of fair representation" that this Court imposed on unions acting as exclusive representatives under federal law. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)(Railway Labor Act); Ford Motor Co. v.

Thus, on a national, industry-wide scale the NIRA fit perfectly into the corporative-state pattern that the California Bar apes at the state level for a single professional group: (i) The government recognized private groups, organized on the basis of "exclusive representation", as the "legislative spokesmen" for all individual firms in each branch of production. And (ii) it empowered those groups to lobby on behalf of all members of the "code authorities", including dissenters, for the enactment of "codes" binding on all members of the industries after approval by the President.

When a dissident member of one "code authority" challenged the act, "[t]he Government urge[d] that the codes [would] 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems'".[40] To that argument, this Court retorted:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for • • • their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? • • • The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[41]

Huffman, 345 U.S. 330 (1953)(National Labor Relations Act).

[40]A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). *Compare* Keller, 767 P.2d at 1030-31.

[41]Schechter, 295 U.S. at 537.

The Supreme Court of California, however, has now created a childishly simple device by which private groups in all conceivable walks of economic and social life throughout the United States can be "constituted legislative bodies": structure those groups as "public corporations" and label them "governmental agencies"! Can this Court imagine that, if it sanctifies the California court's ploy here, numerous "trade or industrial associations or groups" in addition to the California Bar will not soon crawl out from under the slimy rocks of special-interest politics to evolve, at the hands of pliant state and national legislators, into the species of "public corporations" and "governmental agencies" that the California court says may with impunity force dissenting members to finance their partisan legislative and judicial activism as a condition of doing business? And once such evolution begins, where can it end save with nationwide regimentation of economic and social groups in political and ideological *Sturmabteilungen*—camouflaged, by their protective coloration as "governmental agencies", from constitutional attack by the unfortunate dissidents they have drafted?

CONCLUSION

The decision of the Supreme Court of California thus raises an issue fundamental to the continuity of republican government in that State and throughout the United States: "Who controls when, why, and how an individual will participate in the legislative and judicial processes through the exercise of his First-Amendment freedoms of speech and petition—the individual himself, or someone else?" And if "someone else", "How can that individual

be imagined to enjoy a freedom of self-determination and self-government?"[42]

It is bootless to pretend that this case can be confined within a narrow domain defined by the limited authority of the Bar—in analogy to the circumscribed privilege of a statutory "exclusive representative" in the labor-relations context to compel financial support solely for its "collective-bargaining" activities.[43] For the Supreme Court of California has unequivocally held that, in the area of legislative and judicial lobbying, the authority of the Bar "should be read broadly", "[w]hatever the subject of the proposed law".[44]

So, either the supposed "governmental" character of the Bar empowers it with a roving commission to enforce political and ideological conformity on its dissident members "[w]hatever the subject of the proposed law"; or the true, residual private nature of the Bar disqualifies it from exercising such pervasive control over those members no matter what official-sounding name the State confers upon it. If the latter, "[t]he very purpose of [the] Bill of Rights" will be served by "withdraw[ing dissenting lawyers' freedoms of speech and petition] from the vicissitudes of political controversy" and "plac[ing] them beyond the reach of majorities and officials".[45] If the former, the ever-present, ever-ambitious forces of political opportunism

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[42]*See* Board of Educ. v. Barnette, 319 U.S. 624, 630-31 (1943) (issue one of "self-determination in matters that touch individual opinion and personal attitude").

[43]Abood, 431 U.S. at 232-37 (public sector); Street, 367 U.S. at 765-70 (Railway Labor Act); Communications Workers v. Beck, ___ U.S. ___, 108 S. Ct. 2641, 2648-57 (1988)(National Labor Realtions Act).

[44]Keller, 767 P.2d at 1030.

[45]Barnette, 319 U.S. at 638.

will surely soon exploit the spurious "exception" to the First Amendment the California court has created to begin restructuring the American polity along oppressive corporative-state lines.

It cannot happen here? It already has happened once, in the NIRA of the 1930s! This Court was vigilant then, when the danger was patent and imminent. It must be just as—or perhaps even more—vigilant now, when the danger seems, perhaps, contingent and remote. On mincing steps at first, though, march the great historic tragedies that trample free peoples into subjection to arbitrary power. This Court's duty is to turn those steps away from the path on which the Supreme Court of California has set them.

The decision of the Supreme Court of California must be reversed.

Respectfully submitted,

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